UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES
OF CALIFORNIA, INC., D/B/A/ BFI NEWBY
ISLAND RECYCLERY,

Employer,

and

Cases 32-CA-160759
and 32-RC-109684

FPR-II, LLC, D/B/A LEADPOINT
BUSINESS SERVICES,

Employer,

and

SANITARY TRUCK DRIVERS AND
HELPERS LOCAL 350,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Charging Party.

TEAMSTERS LOCAL 350'S
MOTION FOR RECONSIDERATION

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Charging Party Teamsters Local 350, files this Motion for Reconsideration of the Board's Supplemental Decision and Order issued in this matter on July 29, 2020, on the grounds that the Board materially erred by failing to comply with the D.C. Circuit Court's remand order and abandoning the law of the case and the common law legal principles underpinning the joint-employer analysis outlined by the Court.

The Court ordered the Board to clarify the indirect control indicia appropriately considered in the joint-employer analysis, and if it were to still find Browning-Ferris Industries (BFI) to be a joint employer under that clarification, to apply and clarify the second prong of the test articulated in *Browning-Ferris*, 362 NLRB 1599 (2015). The Board did not do this. Instead, the Board prematurely applied its retroactivity analysis to circumvent the Court's order and overturn the joint-employer standard that was the law of this case. The D.C. Circuit clearly indicated that retroactivity balancing was not possible until the Board rearticulated its standard. The Board ignored this too.

The Board compounded its material error by erroneously applying the retroactivity analysis. Because the Board applied its retroactivity analysis without first articulating the joint-employer standard, it could not appropriately weigh the impacts on the parties.

Layering on top of these two material errors, the Board then purported to apply the prior joint-employer standard to this case. However, it did not actually do so. It summarily adopted the Acting Regional Director's Decision and Direction of Election (DDE) by reasoning that the prior Board majority did not argue that the Acting Regional Director (ARD) erred in finding that BFI was not a joint employer under the old standard. But, the Charging Party properly raised and preserved its argument that the DDE was

wrong under the old standard. The prior Board cannot waive the Charging Party's rights. Thus, reconsideration of this part of the opinion is warranted because the Board neglected to consider the issue at all. More fundamentally, the Board cannot simply apply the prior standard because it was inconsistent with the common law. The D.C. Circuit was clear that any applicable standard must be consistent with the common law, and that the Board's prior standard was not.

This series of cascading material errors present extraordinary circumstances justifying the instant Motion for Reconsideration.

I. THE BOARD FAILED TO COMPLY WITH THE COURT'S REMAND

The D.C. Circuit held that the common law joint-employer standard encompasses both reserved and indirect control and that evidence of either cannot be categorically excluded from consideration.

The Court's remand instructed the NLRB to "erect some legal scaffolding" around the indirect-control factor that "keeps the inquiry within traditional common-law bounds and recognizes that '[s]ome such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees.'" *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1220 (D.C. Cir. 2018) (citation omitted).

The D.C. Circuit's decision explained its remand as follows.

> We conclude that the Board's right-to-control standard is an established aspect of the common law of agency. The Board also correctly determined that the common-law inquiry is not woodenly confined to indicia of direct and immediate control; an employer's indirect control over employees can be a relevant consideration. The Board in *Hy-Brand*, in fact, agreed that both reserved and indirect control are relevant considerations recognized in the common law. *See Hy-Brand*, 365 NLRB No. 156 at 4. In applying the indirect-control factor in this case, however, the Board failed to confine it to indirect control over the essential terms and conditions of the workers' employment. We accordingly remand that aspect of the decision

> to the Board for it to explain and apply its test in a manner that hews to the common law of agency.

Browning-Ferris, 911 F.3d at 1209.

> Because we cannot tell from this record what facts proved dispositive in the Board's determination that Browning-Ferris is a joint employer, and we are concerned that some of them veered beyond the orbit of the common law, we remand for further proceedings consistent with this opinion.

Id. at 1221.

> In sum, we uphold as fully consistent with the common law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis. We reverse, however, the Board's articulation and application of the indirect-control element in this case to the extent that it failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment.

Id. at 1222-23.

Additionally, on remand, the Court expected that, if the Board were to find that BFI was a joint employer under the first prong of the *Browning-Ferris* standard, then it would apply the second prong of that standard, and "explain which terms and conditions are essential to permit meaningful collective bargaining." *Id*. at 1222.

The remand required the Board to define the parameters of the indirect control factor, clarify the second prong of the *Browning-Ferris* standard and apply that standard. The Board's Supplemental Decision defies that order. It does not even follow the first instruction -- to rearticulate the parameters of the indirect control factor.

Significantly, the D.C. Circuit did not make a determination regarding whether the "new" joint-employer standard should be applied retroactively because the Court did not know what limits the Board would impose on the indirect-control factor. It explicitly held that an appropriate retroactivity analysis required further articulation of the new standard. The Court held that "the lawfulness of the retroactive application of a new decision cannot be evaluated reliably without knowing with more precision what that new test is and how far it departs (or does not) from reasonable, settled expectation." *Browning-Ferris*, 911 F.3d at 1222. This Board ignored that binding instruction.

In its Supplemental Decision in this case on remand, the Board cites to the D.C. Circuit's statement on retroactivity, but turns it on its head. It ignores the clear directive to rearticulate the indirect control standard bypassing that step entirely and jumping to the retroactivity analysis. *See id.* ("*In rearticulating its joint-employer test on remand,* the Board should keep in mind" certain retroactivity considerations (emphasis added).) The Board justified its premature retroactivity analysis by accepting the Court's "expressed concerns as the law of the case" while ignoring the actual law of the case dictating that it first rearticulate an indirect-control standard.

The Circuit Court was clear that retroactivity could not be assessed before the indirect-control aspect of the test was clarified, and, if necessary, the second prong of the test clarified and applied. Had the Court believed that the retroactivity was properly ripe for consideration, it would have proceeded to address the issue; instead, it found the issue "premature." What was premature for the Court, is no less premature for the Board on remand. In bypassing the standard and jumping to the retroactivity analysis, the Board exceeded the scope of the remand and substituted its judgment for the Court's in this

case. The Board has long held that it "does not have the authority to exceed the scope of the court's remand." *Sagamore Shirt Co.*, 166 NLRB 437, 437 n. 3 (1967); *see also Dubuque Packing Co., Inc.*, 303 NLRB No. 66 n. 19 (1991). The Board's premature retroactivity application defied the Court's mandate in this case. This comprises material error warranting reconsideration.[1]

Furthermore, because the Board members did not rearticulate the joint-employer test, as instructed by the D.C. Circuit, its decision on retroactivity simply amounts to overruling the earlier majority's decision on the same issue. The Board has long applied a rule that three Board members must vote to overrule a prior Board decision. Only two Board members participated in the Supplement Decision, and the Board provided no explanation for why it was departing from its prior three-vote rule. This comprises another material error warranting reconsideration.

II. THE BOARD MATERIALLY ERRED IN APPLYING ITS RETROACTIVITY ANALYSIS

Assuming, *arguendo*, that the Board appropriately reached the retroactivity analysis, it erred in its application. This Board acknowledged the presumption of retroactivity. 369 NLRB No. 139, at *10; *see also Cristal USA, Inc.*, 368 NLRB No. 137, slip op. at 2 (2019) ("The Board's usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage.") The Board will not apply a new rule retroactively only if it would work a "manifest injustice" considering the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the

[1] The Board's assertion that there "is no variation or explanation" of the *Browning-Ferris* test that would not constitute manifest injustice to apply retroactively, sl. op. 3, is no less a contradiction of the Court's order. Had the Court found that no rearticulation of the standard would satisfy a retroactivity challenge, it would have decided the issue. Instead, it specifically said that "the lawfulness of the retroactive application of a new decision cannot be evaluated reliably without knowing with more precision what the new test is and how far it departs (or does not) from reasonable, settled expectations." *Browning-Ferris*, 911 F.3d at 1222. The Court clearly understood that some articulation of the test could be lawfully applied retroactively.

purposes of the Act, and any particular injustice arising from retroactive application.

Here, the Board erroneously found that retroactivity would work a manifest injustice because of material errors in applying this standard. The Board erred in addressing retroactivity without first articulating the standard to determine the reliance interest and, then, the Board erroneously presumed the reliance interest. Further, the Board failed to consider the other factors.

A. The Board Erred in its Analysis of the Reliance of the Parties

The Board reached its "manifest injustice" conclusion largely based on its characterization of the D.C. Circuit's statement that retroactivity "may" be unwarranted after the Board clarified the indirect control factor. 369 NLRB No. 139 at *11. But, the D.C. Circuit did not weigh the factors or balance the interests in a retroactivity analysis. The Court was clear that it could not. The Board's reliance on the Court's characterization of the reliance interest was material error. The Board was required to balance the interests. A closer look at these interests reveals that the Board's conclusion was erroneous.

The reliance interests of the parties is significantly reduced here by the clear common law supporting the new standard. "Under Supreme Court and circuit precedent, the National Labor Relations Act's test for joint-employer status is determined by the common law of agency." *Browning-Ferris*, 911 F.3d at 1206; *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). The Act's definition of "employer" is based in the common law and the Board is given no deference in interpreting the content and meaning of the common law. *Browning-Ferris*, 911 F.3d at 1206. The D.C. Circuit's opinion repeatedly emphasized that reserved and indirect control are part of the common

law of agency citing case law and the Restatement (Second) of Agency. *Browning-Ferris*, 911 F.3d at 1209-1213, 1216-1219 (citations omitted). Thus, the reliance interest of BFI and other employers on Board holdings that reserved and indirect control would not be considered by the Board is reduced given the common law and Supreme Court precedent. *Cf. MV Transportation, Inc.*, 368 NLRB No. 66, at *52 (2019) (applying new rule retroactively in part because the new rule followed D.C. Circuit precedent). In other words, these entities set up their business arrangements knowing that the common law would consider reserved and indirect control in determining joint employment.

Additionally, the reliance interest is lessened because of the highly fact-specific inquiry into joint-employer status. Indeed, in this case, the D.C. Circuit cited to *AT&T v. FCC*, 454 F.3d 329, 333-334 (D.C. Cir. 2016) for the proposition that retroactive application was not unjust where the agency's previous rulings "reflect[ed] a highly fact-specific, case-by-case style of adjudication" that did not establish "a clear rule of law exempting" certain conduct. *Browning-Ferris*, 911 F.3d at 1222. Courts reviewing joint employer cases have repeatedly recognized that under the old standard, "a slight difference between two cases might tilt a case toward a finding of a joint employment." *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993), *quoting Carrier Corp.*, 768 F.2d 778, 781, n.1 (6th Cir. 1985); *accord North American Soccer League v. NLRB*, 613 F.2d 1379, 1382-83 (5th Cir. 1980) ("minor differences in the underlying facts might justify different findings on the joint employer issue"). The highly fact-specific nature of the standard lessens the reliance interest.

Further, the term "direct and immediate" is vague and ambiguous. For example, in *Holyoke Visiting Nurses Assn.*, 310 NLRB 684 (1993), *enf'd.* 11 F.3d 302 (1st Cir.

1993), the Board found that a visiting nurse association was a joint employer with its referral agency even though the nurses were professionals who did not need to be told how to do their jobs. In *G. Heileman Brewing Co., Inc.,* 290 NLRB 991 (1988), the Board found that the supervision provided by the lead firm supported a finding that it was the joint employer of maintenance electricians even though "the maintenance electricians were skilled personnel who were capable of performing their work as needed, without supervisory direction." *Id.* at 996. These cases implicitly recognize that the term "direct and immediate" is elastic and applies differently depending on the type of work and other highly contextualized facts. Given the ambiguity in the preexisting joint employer standard, reliance interests are lessened.

Additionally, the Board's usual practice of applying new policies and standards to all pending cases in whatever stage is strengthened in representation cases because the relief is prospective. There is no issue of backpay, reinstatement or any other retrospective relief of substantial reliance on prior law, only the prospective obligation to bargain with the union.

Reliance interests of potential joint employers here are further minimized because the parties to the business relationship can renegotiate their relationship at any time in order to re-distribute control over terms and conditions of employment. The joint-employer standard is intended to ensure that those entities that control terms and conditions of employment participate in bargaining. If the Board applies a standard that unexpectedly finds an entity to be a joint employer due to certain controls it retains or exercises over terms and conditions of employment, that entity can renegotiate the relationship with the other employer to diminish its control over those terms and

conditions. As the joint employer must only bargain over the terms and conditions it controls, that re-distribution would of control would relieve the entity of any bargaining obligation and return the parties to their settled expectations.

Thus, overall, the reliance interests are weak and do not support overcoming the presumption of retroactivity.

B. The Board Failed to Consider the Effect of Retroactivity on the Purposes of the Act

"In determining whether to apply a change in law retroactively, the Board *must* balance any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019) (emphasis added) (applying retroactively new rule privileging employers to cease dues checkoff upon contract expiration).

In analyzing retroactivity, the Board ignored this factor and failed to weigh it in its analysis. The purpose of the NLRA is effectuated when the employer who controls the terms and conditions of employment is at the bargaining table.[2] Pursuant to the D.C. Circuit's decision, BFI will only be ordered to the table if it is a joint employer under the common law. If BFI is a common-law employer then, by definition, it exercises significant control over employees' terms and conditions of employment and bargaining will be benefitted by that employer's presence. Conversely, permitting a common law

[2] *See, e.g., In re Airborne Freight Co.*, 338 NLRB 597 (2002) (Liebman, concurring) (noting that purpose of Act frustrated if employees prevented "from bargaining with the company that, as a practical matter, determines the terms and conditions of their employment.") Particularly relevant here is the fact that if the employer that controls the speed of the line has no duty to bargain with employees, the Act's purpose of preserving industrial peace will be frustrated because employees who engage in strikes or other protests concerning "the speed of the conveyor . . . [are] engaged in quintessentially protected concerted activity." *Greater Omaha Packing Co*., 360 NLRB No. 62, slip op. at 1 n. 3 (2014), *enf'd in relevant part*, 790 F. 3d 816, 820-22 (8th Cir. 2015).

joint employer to refuse to come to the bargaining table will not effectuate the purposes of the Act.[3]

The Board reasoned that the fact that the election was held naming the labor-supply company as the sole employer counsels against retroactive application. In support of this theory, the Board cited *H&W Motor Express*, 271 NLRB 466 (1984). That case did not address the retroactivity issue much less provide any legal analysis of it. Here, the Board reasoned, in this case, "the reverse situation exists, but the principles stated in *H&W Motor Express* militate against retroactivity all the same[]." But, the Board failed to identify such "principles" and *H&W* is likewise silent. Moreover, the case is inapposite. The situation is reversed. In *H&W*, the employees voted to unionize with joint employers named on the ballot and, on appeal, the Board overturned the Regional Director's decision on joint employment and ordered the uncounted impounded ballots to be discarded and a new election conducted with just one employer. The removal of an employer may limit bargaining ability and impact the union's ability to negotiate. Here, in contrast, the employees voted to unionize for the purposes of bargaining with their employer and including their joint employer serves to effectuate that desire.

C. The Board's Retroactivity Application Was Inconsistent with its Jurisprudence

This Board has consistently applied its decisions changing the law retroactively. It has done so even when it has changed Board law that has been in place for decades and even in cases when it has provided no notice or public participation on the question of whether it should abandon precedent.

[3] This highlights the Board's error in not rearticulating and applying its standard prior to engaging in a retroactivity analysis. The Board cannot possibly perform the balancing required by the retroactivity analysis without first determining whether BFI is a joint employer to fully and fairly evaluate the countervailing interest in denying employee rights to bargain with BFI.

In *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), this Board overruled 70 years of unequivocal precedent applying the "clear and unmistakable" standard for evaluating the effect of a management right's clause in a collective bargaining agreement. The Board dramatically changed the standard to a "contract coverage" standard empowering employers to unilaterally change terms and conditions of employment by denying any obligation to bargain if the topic is covered in the contract accompanied with a broad management's rights clause. This Board applied *MV Transportation* retroactively despite its application to existing collective bargaining agreements negotiated by parties with a specific understanding of the governing law. The reliance interest was much more pronounced given the long-standing nature of the precedent and the clarity of the standard and retroactivity's impact in undoing terms of existing collective bargaining agreements, when the Act is designed to give effect to such bargains.

Indeed, the Union is unable to find any case in which the two members of the instant panel participated in which the Board did not apply a change in law retroactively. *See, e.g., UPMC,* 368 NLRB No. 2 (2019) (overruling *Ameron Automotive Centers*, 265 NLRB 511 (1982) and *Montgomery Ward*, 256 NLRB 800 (1981) and applying a narrower standard for nonemployee organizer access to employer premises that are open to the public retroactively); *Providence Health & Services – Oregon d/b/a/ Providence Portland Medical Center*, 369 NLRB No. 78 (2020) (overruling *Thiele Industries*, 325 NLRB 1122 (1998) and applying a rule rendering ballots with markings in more than one box void retroactively); *Kroger Limited Partnership*, 368 NLRB No. 64 (2019) (overruling *Sandusky Mall Co.*, 329 NLRB 618 (1998) and applying a new standard for

nonemployee union organizer access to employer property retroactively); *The Boeing Co.*, 365 NLRB No. 154 (2017) (overruling *Lutheran Heritage*, 343 NLRB 646 (2004) and applying new framework for analyzing work rules retroactively).

This Board should take the same approach in this case as it has in all other cases involving new rules and apply it retroactively.

III. THE BOARD ERRED IN SUMMARILY AFFIRMING THE ACTING REGIONAL DIRECTOR'S FINDING THAT BFI WAS NOT A JOINT EMPLOYER

A. The Board Must Address the Union's Arguments that the Acting Regional Director Erred in Finding that BFI was not a Joint Employer

After improperly engaging in a retroactive application analysis prior to clarifying the joint employer standard, the Board's Supplemental Decision contains no reasoned basis for affirming the ARD's finding that BFI was not a joint employer under the prior standard. In reaching its conclusions, the Board simply writes:

> The Acting Regional Director applied that standard in his Decision and Direction of Election and found that BFI was not a joint employer of Leadpoint's employees. As the dissenting opinion in the subsequent Board case noted, "the majority does not argue that the Regional Director erred in making this finding." 362 NLRB at 1634 fn. 60. We agree and now affirm the Acting Regional Director's finding that BFI is not a joint employer as dispositive of the joint-employer issue in the present unfair labor practice case.

Browning Ferris, 369 NLRB No. 139, at *15.

Whether BFI is a joint employer does not turn on the current Board's "agree[ment]" that the earlier majority did not "argue" that the ARD erred in not finding BFI to be a joint employer. The prior majority's failure to reach the issue of whether the ARD erred in its finding is irrelevant; the Union, which is a party to the case, did argue that the ARD erred in finding that BFI was not a joint employer under the prior standard. The Union made that argument extensively in its Request for Review from the Decision

and Direction of Election as acknowledged by the prior majority. *See Browning-Ferris*, 362 NLRB 1599, 1605 (2015) ("The Union argues first that, under the Board's current joint-employer standard, BFI constitutes a joint employer of the Leadpoint employees because it shares or codetermines the following essential terms and conditions of employment: employment qualifications, work hours, breaks, productivity standards, staffing levels, work rules and performance, the speed of the lines, dismissal, and wages. BFI's direct control over employees is evinced by its regular oversight of the employees and its constant control of their work. BFI, it argues, demands compliance with "detailed specifications, including the number of employees on each line, where they stand, what they pick, and at what rate they sort. BFI also trains and instructs employees as to how to do their jobs, directing them on picking techniques, what to prioritize, how to clear jams, and when to use the emergency stop.")

The fact that the Board majority in 2015 did not reach the application of the old standard, because doing so was unnecessary to its holding, cannot act as a waiver of the Charging Party's, now necessary, argument.[4] Indeed, the Charging Party reasserted this argument on remand. See, e.g. Charging Party's Statement of Position on Remand, at pp. 21-24.

The Board re-opened the underlying representation case in order to "affirm the Acting Regional Director's finding" in the DDE, but neither addressed nor provided any indication that it even considered the Union's arguments in its Request for Review, or its brief on remand. Instead, the Board treated any argument that the ARD erred as waived

[4] It is not at all clear whether the earlier majority did not find that the Acting Regional Director erred in finding that BFI was not a joint employer under the pre-*Browning-Ferris* standard. The majority found BFI to be a joint employer based on control it exercised "directly and indirectly." *Browning-Ferris*, 362 NLRB at 1616.

because the earlier majority failed to address the issue. By doing so, the Board committed material error. The Board must grant the Union's motion for reconsideration and, for the first time, consider and rule on the Union's arguments that the ARD erred in finding that BFI was not a joint employer.

B. The Board Cannot Summarily Affirm the ARD's Finding that BFI was not a Joint Employer Because the Acting Regional Director Improperly Applied a Standard that is Inconsistent with the Common Law

The Board further committed material error when it summarily affirmed the ARD's finding that BFI was not a joint employer, as the ARD applied a standard that did not comport with the common law as the D.C. Circuit held in this case.

The D.C. Circuit was absolutely clear that the Board must apply common law principles when determining whether an entity is a joint-employer: "Under Supreme Court and circuit precedent, the National Labor Relations Act's test for joint-employer status is determined by the common law of agency." *Browning-Ferris*, 911 F.3d at 1206. Indeed, the Court held that the Board is accorded no deference in determining its joint-employer standard, because the Board does not have "the power to recast traditional common-law principles of agency in identifying covered employees and employers." *Id.* at 1207; *see also id*. at 1208 ("we review *de novo* whether the Board's joint-employer test comports with traditional common-law principles of agency"). The Board, "in other words, must color within the common-law lines identified by the judiciary." *Id*. at 1208.

The D.C. Circuit held that the prior joint-employer standard was not consistent with the common law. The Court held that reserved control "is an established aspect of the common law of agency." *Id*. at 1209. According to the Court, that "joint-employer status considers not only the control an employer actually exercises over workers, but

also the employer's reserved but unexercised right to control the workers and their essential terms and conditions of employment[ ] finds extensive support in the common law of agency." *Id*. Indeed, the Court indicated that its precedent "already squarely addressed that common-law question[,]" quoting *Int'l Chem. Workers Union Local 483 v. NLRB*, 561 F.2d 253, 255 (D.C. Cir. 1977), as stating that "whether two entities are joint employers under the National Labor Relations Act depends upon the amount of actual *and potential control* that the putative joint employer has over the employees." *Id*. (emphasis in original; internal quotation marks, brackets, and ellipsis omitted). Such control may be determinative under the common law. *Id*. at 1211 (explaining that under analogous "dual master doctrine" "right of the putative masters to control the conduct of the servant is determinative of whether the servant has two masters at the same time" (internal quotation marks and emphasis omitted)). Thus, that "an employer's authorized or reserved right to control is relevant evidence of a joint-employer relationship wholly accords with traditional common-law principles of agency." *Id*. at 1213.

Similarly, the D.C. Circuit held that "[t]he Board [ ] correctly discerned the content of the common law" when it held that "indirect control can be a relevant factor in the joint-employer inquiry." *Id*. at 1216; *see id*. at 1218 ("There is [ ] broad agreement that the common law factors indirect control into the analysis of employer status."). Any "rigid distinction between direct and indirect control has no anchor in the common law." *Id*. The Court explained that "the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship[,]" and that the Circuit's "cases too have considered indirect control relevant to employer status." *Id*. at 1217. Again, the Court indicated that such control may be

determinative under the common law. *Id*. at 1219 (expressing that common law cannot be at war with common sense, which a rule against indirect control, "no matter how extensively the would-be employer exercises determinative or heavily influential pressure and control over all of the worker's working conditions," would require). Accordingly, accounting for indirect control in the joint-employer analysis "is consonant with established common law." *Id*. at 1217

"In sum, [the Court] uph[e]ld as fully consistent with the common law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis." *Id*. at 1222. Neither of these holdings were subject to the Court's remand. Thus, the law of case is that 1) "the National Labor Relations Act's test for joint-employer status is determined by the common law of agency"; and 2) "both reserved authority to control and indirect control" are "fully consistent with the common law." Yet both reserved and indirect control were rejected as evidence under the prior joint-employer standard that the Board applied on remand.

The ARD applied the prior "direct and immediate" standard, which did not include consideration of reserved authority or any form of indirect control. Sl. op. 4 (ARD applied "prior longstanding standard requiring proof of direct and immediate control"), *Browning-Ferris*, 911 F.3d at 1201 (describing direct and immediate control standard as relying "only on evidence of (i) actual control, as opposed to the right to control, and (ii) direct and immediate control, not indirect control"). By summarily affirming the ARD's finding that BFI was not a joint employer pursuant to this standard, the Board did not apply a standard that is "fully consistent with the common law." The law of the case does not allow the Board to apply such a standard. The Board committed

material error, and must grant this motion for reconsideration to apply, either itself or by remanding to the Region, a joint-employer standard consistent with the common law.

While the D.C. Circuit did state that "[i]n rearticulating its joint-employer test on remand," "the Board should keep in mind" that retroactive application may be inappropriate in certain circumstances, it did not mean that the Board was free to apply a standard inconsistent with the common law. Such an intention would be nonsensical, as the Court would not defer to the Board's application of such a standard. *See id*. 1208 ("we review *de novo* whether the Board's joint-employer test comports with traditional common-law principles of agency"). Even if the Board is correct in not applying *Browning-Ferris*'s two-step analysis retroactively, it must still apply a standard that comports with the common law. It has not done so, which is material error.

For the foregoing reasons, the Charging Party, submits this Motion for Reconsideration and respectfully requests that the Board Reconsider the Supplemental Decision in this matter to conform with the D.C. Circuit's remand Order and the common law.

Dated this 9th day of October 2020 at San Francisco, California.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 9, 2020, a copy of the foregoing TEAMSTERS LOCAL 350'S MOTION FOR RECONSIDERATION in NLRB Cases 32-CA-160759 and 32-RC-109684 was served by electronic mail and by United States first-class mail on the following case participants:

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